GBK v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 24288 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24288 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E013 OF 2022

KW KIARIE, J

OCTOBER 24, 2023

BETWEEN

GBK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O case No.50 of 2019 of the Chief Magistrate's Court at Malindi by Hon. W.K Chepseba–Chief Magistrate)

JUDGMENT

1. GBK, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No.3 of 2006.

2. The particulars of the offence were that on the 15th day of August 2019 within Kilifi County being a male person caused his penis to penetrate the vagina of MGB, a female aged 11 years who to his knowledge was his daughter.

3. The appellant was sentenced to life imprisonment.

4. The appellant was in person. He has appealed against both conviction and sentence. He raised grounds of appeal as follows:

    a. That the trial court erred in law and fact by failing to see that the witness statements were not availed to the appellant at the trial.

    b. The trial court erred in law and fact by failing to see that the voir dire examination which was conducted on the complainant was not unequivocal.

    c. That the learned trial court magistrate erred in law and facts by failing to consider the appellant's mitigation under sections 216 and 329 of the *Criminal Procedure Code*.

d. That the trial court erred in law and fact by failing to take into account the pre-trial custody period in the sentence.

5. The appeal was opposed by the state through M/s Alice Ochola, learned counsel on grounds that:

a. The conviction was based on the evidence on record.

b. The sentence was proper in accordance with the law.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.

7. Article 50 (2) (c), (j) & (k) of the *Constitution* of Kenya provides as follows:

(2) Every accused person has the right to a fair trial, which includes the right—

(c) c) to have adequate time and facilities to prepare a defence;

(j) to be informed in advance of the evidence the prosecution intends to rely on,and to have reasonable access to that evidence;

k) to adduce and challenge evidence;

> In order for these rights to be realized, an accused person ought to be supplied with copies of prosecution witnesses' statements. In the instant case, although the record does not indicate whether the appellant was supplied with the said copies, at the time of the commencement of the hearing, he indicated that he was ready for the hearing. This was on the 1st of October 2019. I have checked the record and I have noted that the appellant did not complain to the learned trial magistrate that he had not been supplied with the statements. The appellant is therefore estopped from alleging that he was prejudiced on account of failure to be supplied with the statements. The appeal will not therefore turn on this point.

8. Section 20 (1) of the *Sexual Offences Act* provides:

> Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

9. The ingredients of incest, flowing from the provisions of this section, are as follows:

a. The accused must be a male;

b. The victim must be a female;

c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;

d. He must have knowledge of the relationship; and

e. There must be penetration.

10. The medical evidence adduced by Moses Rimba (PW4) was that the complainant was admitted on 16th August 2019 while bleeding per vagina. This was after she was allegedly defiled. Upon examination, it was confirmed that she had been defiled.

11. HBK (PW2) is the grandmother of the complainant. She testified that after the child was treated on 15th August 2019 at a dispensary, she continued to bleed from her genitalia and was referred to another medical facility.

12. The appellant in his defence contended that he had taken the complainant to hospital where she was admitted for vomiting. The following day the doctor called police officers who arrested him.

13. This contention by the appellant lacks merit and I therefore find that there was sufficient evidence that the complainant had been defiled.

14. The evidence of the complainant was that she was defiled by the appellant. This was after he had asked other children to go home. The prosecution did not call other witnesses who could linked the appellant to the offence. The proviso to section 124 of the *Evidence* Act provides as follows:

> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

15. The learned trial magistrate found that the complainant was consistent in her assertion as to who defiled her. I have gone through the evidence and I have satisfied myself that this finding by the trial learned magistrate cannot be faulted. I, therefore, concur with the court below that it was the appellant who defiled the complainant.

16. Both the appellant and the complainant testified that they were father and daughter. HBK (PW2) also testified that the appellant was the father of the complainant.

17. From the foregoing, I find that the ingredients of the offence of incest were proved to the required standards.

18. An appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson vs. Republic* [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in *James vs. Rex* (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. *R vs. Shershewsity* (1912) C.CA 28 T.LR 364.

19. The proviso to section 20 (1) of the *Sexual Offences Act* states:

> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for

life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

20. In the instant case, the victim was aged eleven years at the time of the offence. In the circumstances of this case, I have no reasons on the record to persuade me to interfere with the sentence meted out by the trial court.

21. The appeal is accordingly dismissed for lack of merits.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER, 2023.

KIARIE WAWERU KIARIE

JUDGE